

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 2002 Session

**VANTAGE FINANCIAL CORPORATION v. THOMAS S. McNIEL**

**Appeal from the Chancery Court for Davidson County  
No. 00-3649-I, Irvin H. Kilcrease, Jr., Chancellor**

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**No. M2002-00047-COA-R3-CV - Filed January 7, 2003**

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This appeal arises from summary judgment being granted in favor of the plaintiff on a promissory note and compromise agreement. On this appeal, the defendant contends summary judgment was inappropriate because genuine issues of material fact existed as to whether the plaintiff had waived its rights under the promissory note and compromise agreement and whether the defendant was in default. We affirm and find the plaintiff is entitled to summary judgment as a matter of law.

**Tenn R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed**

W. MICHAEL MALOAN, Sp. J., delivered the opinion of the court, in which BEN H. CANTRELL, PJ., M.S. and PATRICIA J. COTTRELL, J., joined.

Mark A. Baugh, Nashville, Tennessee, for the appellant, Thomas S. McNiel

Phillip Byron Jones, Nashville, Tennessee, for the appellee, Vantage Financial Corporation

**OPINION**

On November 30, 1989, the defendant, Thomas S. McNiel, executed a Promissory Note in favor of First American National Bank (FANB) in the principal amount of \$47,0003.78. The note default provisions provided in part “this right of the holder is a continuing one, not subject to waiver by non-use.” The defendant defaulted on this indebtedness and on August 11, 1992, McNiel and FANB entered into a Compromise Settlement and Note Modification Agreement (Compromise Agreement) whereby McNiel would pay \$36,000 without interest to FANB over seventy-two (72) consecutive months at the rate of five hundred dollars (\$500) per month. The Compromise Agreement incorporated the terms of the original note and provided that in the event of default the entire original balance and accrued interest would be due and payable.

McNiel made payments according to the Compromise Agreement, but was late on occasion and missed some payments altogether. McNiel alleged he entered into an oral modification agreement with Lee Snodgrass, an officer of FANB, to accept late or missed payments without being in default. McNiel's version of their agreement was that he was to pay when he had the money and would not be in default if he did not pay. McNiel acknowledged FANB's right to demand payment, but it never did so. Snodgrass denied any such agreement ever took place. McNiel's last payment was made on June 22, 1999.

On July 18, 2000, AmSouth (a successor in interest to FANB) assigned the subject Promissory Note to the plaintiff, Vantage Financial Corporation (Vantage). As McNiel had not made a payment for over a year, Vantage sent a demand for payment to McNiel on August 21, 2000. McNiel did not make any payments and this lawsuit was filed on November 27, 2000. The plaintiff Vantage sought a judgment for \$62,458.00, plus interest, attorney's fees and costs. McNiel answered and asserted numerous defenses. After discovery, Vantage filed a motion for summary judgment. On November 30, 2001, the trial court considered McNiel's argument and granted summary judgment in favor of Vantage in the amount of \$67,708.44 plus costs of \$363.27 and attorney's fees of \$8,134.71, for a total judgment of \$76,206.36.

In his order granting summary judgment, Chancellor Kilcrease found:

Having considered Vantage's motion, defendant's response, the supporting documents, and the argument of counsel, the Court finds the motion is well taken and, therefore, it is granted. In so concluding, the Court finds, as a matter of law, that the 1992 Agreement and the 1989 Promissory Note constitute the same obligation. The defendant argued that the 1992 Agreement was orally modified and that as a result, Vantage waived its right to enforce the Note and Agreement. However, the 1992 agreement expressly states the terms of the Note remain in effect. Still further, the Note expressly provides that it is not subject to waiver.

The Court likewise finds that there are no disputed issues of fact and to the extent a few facts are disputed, they are immaterial. Accordingly, Vantage is entitled to summary judgment as a matter of law.

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 215 (Tenn. 2001); *Bryd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). The party seeking summary judgment bears the burden of demonstrating that no genuine dispute of material fact exists and that he is entitled to a judgment as a matter of law. *Shadrick v. Coker*, 963 S.W.2d 726, 731 (Tenn. 1998).

McNiel submits summary judgment was inappropriate in this case because a genuine issue of material fact existed as to whether FANB waived its rights under the Promissory Note. In support of his argument, McNiel relies on his testimony of an oral modification and Snodgrass's affidavit that

no such agreement was ever made creates a disputed material fact. The trial court found these disputed facts were not material.

McNiel relies on numerous authorities that parties can orally modify a contract and continued acceptance of late or non payment without notice that such will no longer be tolerated constitutes a waiver of a right to forfeiture of a contract. *Lively v. Drake*, 629 S.W.2d 900, 904 (Tenn. 1982); *American National Ins. Co. v. Davidson*, 166 Tenn. 13, 57 S.W.2d 788, 789-91 (1933).

The facts of this case are similar to *Spectra Plastics, Inc. v. Nashoba Bank*, 15 S.W.3d 832 841, 842 (Tenn. Ct. App. 1999), where the debtor contended the creditor bank waived its right to demand payment through a course of conduct. The promissory note in question established that any waiver by the bank of its right to declare an event to be a default did not waive its right “to later consider the event as a default if it continues or happens again.” The trial court granted summary judgment in favor of the bank on this and other defenses raised by the debtor. Finding no genuine issues of material fact, the Court of Appeals, Western Section, affirmed.

Considering McNiel's argument in its best light, that FANB had accepted late payments and allowed him to miss payments when he did not have sufficient funds to pay them, such course of conduct does not excuse his failure to make any payments after August 21, 2000 when Vantage made demand for payment. McNiel testified he recognized FANB's right to demand payment, but ignored Vantage's demand for payment. Even accepting McNiel's position that an oral modification occurred, the result would be the same, Vantage demanded payment, McNiel did not pay, and summary judgment was appropriate.

We find, as did the chancellor, that no genuine issues of material fact exist in this case and summary judgment in favor of Vantage was appropriate.

#### CONCLUSION

We affirm the grant of summary judgment in favor of the plaintiff, Vantage Financial Corporation, against the defendant, Thomas S. McNiel, in the principal amount of \$67,708.44 plus costs and attorneys fees of \$8,134.71, for a total judgment of \$76,206.36. The costs of this appeal are taxed to the defendant appellee, Thomas S. McNiel, and his surety for which execution, if necessary, may issue.

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W. MICHAEL MALOAN, S.J.